

JEFFREY BOSSERT CLARK  
Acting Assistant Attorney General  
ALEXANDER K. HAAS  
Branch Director  
DIANE KELLEHER  
BRAD P. ROSENBERG  
Assistant Branch Directors  
ELLIOTT M. DAVIS  
STEPHEN EHRLICH  
JOHN J. ROBINSON  
ALEXANDER V. SVERDLOV  
M. ANDREW ZEE  
Trial Attorneys  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
1100 L Street, NW  
Washington, DC 20005  
Telephone: (202) 305-9803

*Attorneys for Defendants*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION**

NATIONAL URBAN LEAGUE, *et al.*,

Plaintiffs,

v.

WILBUR L. ROSS, JR., *et al.*,

Defendants.

Case No. 5:20-cv-05799-LHK

**REQUEST FOR RULE 502(d) ORDER**

1 This Court invited the parties to “file a proposed claw back protective order under Fed. R.  
 2 Evid. 502 and Fed. R. Civ. P. 26(b)(5)(B).” ECF No. 383 at 3. In light of that invitation, Defendants  
 3 respectfully request that the Court enter the attached order regarding non-waiver of privileges and  
 4 protections under Federal Rule of Evidence 502(d).

5 The parties have negotiated a clawback agreement and were able to reach an understanding  
 6 on many procedural provisions. But despite their representation to this Court that “Plaintiffs have no  
 7 issue with [a clawback] agreement in principle, and will work to finalize it with Defendants,” ECF No.  
 8 378 at 8, Plaintiffs have not agreed to critical but standard terms proposed by Defendants. Specifically,  
 9 Plaintiffs object to the following key language in Defendants’ proposed clawback agreement:

10 The parties intend that this stipulated order shall displace the provisions of Fed. R.  
 11 Evid. 502(b)(1) and (2). That is, the disclosure of privileged or protected information,  
 12 as described above, in this litigation shall not constitute a subject matter waiver of the  
 13 privilege or protection in this or any other federal or state proceeding, regardless of  
 14 the standard of care or specific steps taken to prevent disclosure. However, nothing  
 in this Order shall limit a party’s right to conduct a pre-production review of  
 documents as it deems appropriate.

15 *See* Ex. 1 (redline showing Plaintiffs’ objections).

16 As Defendants explained, Plaintiffs’ proposed edits—which would delete any reference to the  
 17 clawback displacing Fed. R. Evid. 502(b)—would defeat the very purpose of a clawback order. *Irth*  
 18 *Sols., LLC v. Windstream Commc’ns LLC*, 2017 WL 3276021, at \*12 (S.D. Ohio Aug. 2, 2017)  
 19 (“[C]lawback agreements effectuate the dual purposes of Rule 502—providing a predictable, uniform  
 20 set of standards under which parties can determine the consequences of a disclosure, while  
 21 simultaneously reducing discovery costs.”). This language is standard in clawbacks for good reason:  
 22 “It goes without saying that parties must adequately articulate the desire to supplant analysis under  
 23 Rule 502(b) in any agreement under Rule 502(d) or (e).” *Great-W. Life & Annuity Ins. Co. v. Am. Econ.*  
 24 *Ins. Co.*, 2013 WL 5332410, at \*13 (D. Nev. Sept. 23, 2013).

25 Defendants have represented to Plaintiffs, and now to this Court, that they have no intention  
 26 of attempting to claw back large volumes of documents post production. But the Court has repeatedly  
 27 made clear that “time is of the essence” because “[t]he holidays are approaching, and the fact discovery  
 28 cut-off is January 7, 2021.” ECF No. 380 at 1; ECF No. ECF 372 at 1; ECF No. 370. So given the

breakneck pace of review, and given Your Honors' desire to rule expeditiously in any privilege disputes, Defendants understandably desire that any clawback order displace Rule 502(b) and allow Defendants to clawback specific documents that may be disclosed. This is not only in line with the exact purposes of Rule 502, but would help to expedite the pace of production—something both Plaintiffs and this Court would presumably favor.

Defendants therefore respectfully request that the Court enter the attached clawback order, to which the parties have reached agreement except for language in the first two unnumbered paragraphs.

DATED: December 17, 2020

Respectfully submitted,

JEFFREY BOSSERT CLARK  
Acting Assistant Attorney General

ALEXANDER K. HAAS  
Branch Director

DIANE KELLEHER  
BRAD P. ROSENBERG  
Assistant Branch Directors

/s/ Stephen Ehrlich  
ELLIOTT M. DAVIS  
STEPHEN EHRLICH (NY Bar No. 5264171)  
JOHN J. ROBINSON  
ALEXANDER V. SVERDLOV  
M. ANDREW ZEE  
Trial Attorneys  
U.S. Department of Justice  
Civil Division, Federal Programs Branch  
1100 L Street, NW  
Washington, DC 20005  
Telephone: (202) 305-9803

*Attorneys for Defendants*